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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRYAN E. RUSSELL, Defendant and Appellant.	A102768 (Del Norte County Super. Ct. No. CRF-02-9692-3)

Bryan Russell appeals from convictions entered upon his guilty pleas to counts of unlawful taking of a motor vehicle and petty theft. He contends the trial court erred in failing to appoint new counsel for his motion to withdraw his plea and in denying the motion to withdraw the plea. We affirm.

STATEMENT OF THE CASE

Appellant and codefendant Felicia Marie Rivera were charged by information filed on September 12, 2002, with three felony offenses: One count of unlawful taking of a vehicle (Veh. Code, § 10851); one count of second degree burglary (Pen. Code, § 459); and one count each of petty theft with a prior theft conviction (Pen. Code, § 666). It was further alleged that appellant had suffered a prior conviction within the meaning of Penal Code sections 1170.12 and 667, subdivisions (b) through (i), and served a prior prison term within the meaning of section 667.5, subdivision (b). Appellant and Rivera were additionally charged with misdemeanor unauthorized possession of a hypodermic needle and syringe (Bus. & Prof. Code, § 4140), and appellant was charged with misdemeanor

resisting, obstructing or delaying a police officer (Pen. Code, § 148) and assaulting a police officer (Pen. Code, § 241, subd. (b)).

Appellant initially entered pleas of not guilty and denied the special allegations on September 13, 2002. On October 17, appellant agreed to a plea bargain under which he would plead guilty to the counts of felony unlawful taking of a vehicle and misdemeanor petty theft, admit the prior conviction and receive probation. The probation department rejected the plea bargain because it involved probation and appellant had a history of failing on parole. On November 21, the trial court followed the probation department's recommendation and rejected the plea bargain.

On January 24, 2003, the court heard and denied appellant's *Marsden*[1] motion to replace his attorney.

On April 4, appellant entered a plea of guilty to the counts of unlawful taking of a vehicle and petty theft and admitted the enhancement allegations. The stipulated maximum sentence was four years eight months.

On April 29, appellant moved to withdraw his plea. On May 16, he made an oral *Marsden* motion, which was denied, and a *Faretta*[2] motion for self-representation, which was then withdrawn. After a hearing on May 22, appellant's motion to withdraw his plea was denied.

Appellant was sentenced on May 22, 2003, to a prison term of three years for the vehicle taking, a consecutive one-year-term for the enhancement and a concurrent term of three years for the theft.

Appellant's request for a certificate of probable cause was granted. He filed a timely notice of appeal on May 27, 2003, and filed another notice of appeal on July 10, 2003.

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[1] *People* v. *Marsden* (1970) 2 Cal.3d 118.

[2] *Faretta v. California* (1975) 422 U.S. 806.

STATEMENT OF FACTS[3]

At about 2:17 p.m. on August 26, 2002, security personnel from a WalMart flagged down a Del Norte County deputy sheriff and said appellant had left the store with a welder and other items totaling $410.93. The security tags on the items had activated the WalMart security alarm. When confronted outside the store, appellant had said he had no receipts, then took the items into the store and attempted to get a refund.

Appellant was denied a refund and left the items at the customer service desk. He got into a parked Toyota Corolla in the WalMart parking lot, then walked to Ace Hardware. The deputy sheriff contacted him in the Ace Hardware parking lot and WalMart security personnel identified him as the person seen leaving WalMart.

Appellant told the officer that he had been denied a refund at WalMart because he did not have receipts, and that he was in the Ace Hardware parking lot looking for his girlfriend, codefendant Rivera. He gave two stories about how the welder came into his possession: that he purchased it the prior week, and that his boss purchased it. Appellant was arrested, handcuffed and placed into a patrol vehicle.

Another officer found Rivera sitting in the Toyota Corolla, which was determined to have been stolen from Eureka the day before. Appellant said the car was not his. Appellant was removed from the patrol car to be rehandcuffed after an officer noticed appellant had maneuvered his hands in front of him. He attempted to break away, was forced to the ground and refused to comply with demands. He was rehandcuffed, refused to stand or walk, and was picked up by two officers and placed into the patrol vehicle.

At the Del Norte County Jail, during the booking search, appellant attempted to kick the officer in the groin. As he tried to kick, a small plastic bag of marijuana fell out of his left pant leg. An AAA Auto Club Card belonging to the owner of the stolen car was found in appellant's wallet.

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[3] The statement of facts is taken from the Presentence Investigation Report filed on November 8, 2002.

In an interview on November 6, 2002, appellant stated he had not stolen the car but had given drugs to an ex-boyfriend or "care provider" of the victim in exchange for the car, and had been given the AAA card in case of problems with the car. He stated that his boss had purchased the welder and given it to him, he had pawned it, then retrieved it and attempted to exchange it at WalMart. He denied stealing the welder but admitted having stolen a small air tool attachment. He denied attempting to kick the officer while being booked, stating that he was attempting to get the bag of marijuana out of his pant leg. He also related that he had a robbery conviction from Oregon and other unknown arrests in Texas and Kentucky.

DISCUSSION

Appellant contends the trial court abused its discretion in failing to appoint new counsel for his motion to withdraw his guilty plea and in denying the motion. He maintains that he was manipulated into entering the plea by codefendant Rivera's entreaties and her attorney's representations at a conference at which appellant's own attorney was not present.

I.

Appellant relies upon *People v. Smith* (1993) 6 Cal.4th 684 (*Smith*) to argue that he was entitled to substitute counsel on his motion to withdraw his plea because he made a colorable claim that his attorney's actions and inactions affected his decision to plead guilty.

Smith held that the standard for assessing whether a defendant claiming ineffective assistance of counsel is entitled to a new attorney is the same at any stage of trial. "[T]he trial court should appoint substitute counsel when a proper showing has been made at any stage. A defendant is entitled to competent representation at all times, including presentation of a new trial motion or motion to withdraw a plea. For the reasons identified in *People v. Fosselman* [(1983)] 33 Cal.3d [572], 582-583, justice is expedited when the issue of counsel's effectiveness can be resolved promptly at the trial level. In those cases in which counsel *was* ineffective, this is best determined early. Thus, when a defendant satisfies the trial court that adequate grounds exist, substitute counsel should be

appointed. Substitute counsel could then investigate a possible motion to withdraw the plea or a motion for new trial based upon alleged ineffective assistance of counsel. Whether, after such appointment, any particular motion should actually be made will, of course, be determined by the new attorney.

"We stress equally, however, that new counsel should not be appointed without a proper showing. A series of attorneys presenting groundless claims of incompetence at public expense, often causing delays to allow substitute counsel to become acquainted with the case, benefits no one. The court should deny a request for new counsel at any stage unless it is satisfied that the defendant has made the required showing. This lies within the exercise of the trial court's discretion, which will not be overturned on appeal absent a clear abuse of that discretion.

"We thus hold that substitute counsel should be appointed when, and only when, necessary under the *Marsden* standard, that is whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel (*People v. Webster* [(1991)] 54 Cal.3d [411,] 435), or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result (*People v. Crandell* [(1988)] 46 Cal.3d [833,] 854)." (*Smith, supra,* 6 Cal.4th at pp. 695-696.)

Appellant's motion to withdraw his guilty plea was not based on a claim of ineffective assistance of counsel. Rather, appellant sought to withdraw his plea on grounds of mistake or ignorance, claiming that he was induced into entering his plea by the mistaken belief that he was helping codefendant Rivera to receive a lesser sentence, but then subsequently learned Rivera had no intention of continuing their romantic relationship. Appellant stated in his points and authorities that he was "manipulated and 'tricked' into his plea" and in his declaration that he "would not have entered [his] guilty plea but for the persuasion of co-defendant Felicia Rivera." At an initial hearing, appellant placed the blame on Rivera's attorney, indicating he did not want to call Rivera

as a witness: "It was more of [Rivera's attorney's] representation of Miss Rivera that led me into wanting to do this, the answers he gave me on some questions without my attorney being present."

Given the stated basis of appellant's motion to withdraw his plea, the *Smith* standards were not triggered. About two weeks after the motion was filed, however, at the time set for hearing, appellant made a *Marsden* motion, stating he believed his attorney was part of a "group effort" to coerce him into pleading guilty. The court conducted a hearing outside the presence of the district attorney. Appellant said he had had no conversations with his attorney about whether he should plead guilty. He claimed that his attorney had insisted on having a conference between appellant, Rivera and their attorneys at a time when his attorney knew he had to be in court, then had been absent for most of the conference because of this court commitment. Appellant felt his attorney was "trying to get me a prison sentence" because he had recommended several times that appellant take a plea bargain with a prison term of four years eight months while appellant believed the maximum term he faced was four years. The court explained to appellant that he was facing ten years or more.

Defense counsel stated that the conference was arranged because the two defendants wanted to discuss the package deal plea bargain. He explained, "At one point I did need to excuse myself from the room to attend—I believe it was a hearing—a short hearing in Department 2, but that allowed Mr. Russell and Miss Rivera to talk. I came back. Mr. Russell said he was willing to accept the offer that had been on the table for actually quite a while, and—he entered the—entered the plea. [¶] Mr. Russell and I have discussed this, I don't know how many times. I was just looking through my file. I don't have time right now to make up a—to represent to the Court how many conferences I've had with Mr. Russell but it's been numerous, and then I've also filed a—at his request a motion to—to withdraw the plea and his declaration is in the Court's file."

Appellant denied having wanted to speak to Rivera privately before entering his plea, stating that the day before the conference he had talked to "Mental Health" and asked "to be separate from any physical contact with her at all of her presence. And that

can be verified through Mental Health. Which stated I was co-dependent on Miss Rivera and it wasn't healthy because when I'm in her presence I'll just about do anything she says."

Appellant read from a prepared statement, in which he stated that his attorney participated in a "group effort that coerced me to false answers and statements to include both mental and physical manipulation, all my emotions, feelings and love to my co-defendant, Felicia Rivera." According to appellant, his attorney insisted upon the 3:00 p.m. meeting on Friday, April 4, despite the judge's offer of more time to think about the plea offer. When appellant asked about representing himself in court, Rivera's attorney told him he would still have to be ready to start trial on Monday. Appellant's attorney was only present for the first couple of minutes of the conference, then returned toward the end, but left again after saying that appellant and Rivera should be left alone.

Appellant asserted that while his attorney was gone, Rivera's attorney gave misleading and untruthful answers to appellant's questions, including that he could not think over the offered bargain for a couple of days but had to decide immediately and that appellant would only have to serve 14 more months if he took the plea bargain. Appellant asserted that although the plea bargain gave him no benefit, Rivera's attorney told him Rivera would get a maximum of six years under the offered bargain but would face "a lot more time" if appellant did not agree to the bargain. Rivera "coaxed me over to her and started rubbing my fingers a special way and talking to me in a certain tone of voice along with a private type of luring eye contact we've always had between us." Appellant stated, "I was trapped and my love for Felicia was being visibly tested then she started talking about missing her little ones and I felt my heart pounding and my throat constricting. I felt so much sorrow for Felicia who could not see her kids needing their mom like I did when I was a little boy but she was never home. This was where my emotions overruled logic and I gave in. [¶] However, after reasoning with myself and all the foregoing, I came to the conclusion that all this had been a group effort on the part of Felicia Rivera, [Rivera's attorney, appellant's attorney] and also [the district attorney] in an attempt to get me to accept the detrimental package deal offer of four point eight years

by the use of some professional manipulation tactics used by Felicia Rivera who also was under the direct impression that this alleged package deal would be definite in reducing her sentence of at least two or more years, thus enabling her to reunite with her children which turned out not to be the case nor true."

Appellant further stated that he had previously attempted to change attorneys but had been denied by the court,[4] and that his attorney had withheld important information from him, refused to honor some of appellant's requests on "easily obtainable legal matters," incriminated appellant on the record in court, never had appellant's best interests in mind and never tried to negotiate a "reasonable plea offer" for appellant.

The court denied the *Marsden* motion. Appellant then asked to represent himself. The court warned that it was not going to permit delays or continuances and appellant would have to be prepared "in a timely manner," meaning appellant would have to be ready to present his motion to withdraw his plea "in the same length of time [his attorney] would have been ready." The court then explained at length what would be expected of

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[4] Appellant had previously complained about his attorney in an October 2, 2002 letter to the court. The bulk of the letter was devoted to complaints about appellant's treatment in jail and Rivera's attorney's actions, but appellant stated briefly that he had been "improperly represented" by his attorney. Appellant stated that his attorney did not appear at his "O.R. hearing" and refused to come to the jail to talk with him, and that he had tried to " 'fire' " his attorney over the telephone.

On January 24, 2003, appellant requested substitution of counsel. At the ensuing hearing, appellant stated his attorney had seen him "for two minutes twice in the last five months," had sent him a wrong phone number, sent him "allocated penal codes" when he asked to go to the law library, and incriminated him by saying he was a heroin addict when the court asked about a "special circumstance." The court explained that defense counsel had been addressing the need for a "special circumstance" for appellant to be granted probation, so that counsel was actually trying to help appellant. Appellant complained that his attorney had not talked to him about evidence which appellant believed could have resulted in a better plea offer and incorrectly stated that appellant had never successfully completed probation or parole. Appellant's attorney acknowledged that he had not been in contact with appellant recently because he did not think there was a need until pretrial preparation began, and stated that he "[a]bsolutely" had time to prepare for trial and adequately represent appellant. The court denied the *Marsden* motion.

appellant in representing himself on the motion, at sentencing if he was unsuccessful on the motion, or at trial if he was successful. The court strongly advised appellant against making this choice. After confirming that "there's no way whatsoever that you'll let me switch attorneys," appellant said he would not represent himself, commenting that "[y]ou're giving me no choice." The court stated it would "deem the *Marsden* motion as being withdrawn," although it is apparent from context that it was in fact referring to the *Faretta* motion.

Appellant does not directly challenge the denial of his *Marsden* motion on appeal. This motion, however, was in practical effect a motion for new counsel to pursue the motion to withdraw the guilty plea. As explained above, substitute counsel should be appointed at any stage "when, and only when, necessary under the *Marsden* standard." (*Smith, supra,* 6 Cal.4th at p. 696.) " '[W]hen a defendant moves for substitution of appointed counsel, the court must consider any specific examples of counsel's inadequate representation that the defendant wishes to enumerate. Thereafter, substitution is a matter of judicial discretion. Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel.' (*People v. Webster* [, *supra*,] 54 Cal.3d [at p.] 435; accord, *People v. Freeman* (1994) 8 Cal.4th 450, 480.)" (*People v. Horton* (1995) 11 Cal.4th 1068, 1102.)

We cannot find an abuse of discretion here. Appellant was given ample time to express his grievances and does not claim otherwise. Several of appellant's specific complaints were based on faulty premises. For example, appellant thought that his attorney was trying to convince him to accept a plea bargain for more than the maximum sentence he faced, but in fact the combination of charges against appellant carried a sentence significantly greater than that in the plea offer. Similarly, appellant thought his attorney was incriminating him by raising his addiction as a "special circumstance," when in fact the special circumstance was required for the court to be able to grant probation. Appellant's main complaint was that his attorney left him alone with Rivera and her attorney. On this point, the court obviously weighed appellant's testimony that

he did not want to be alone with Rivera against his attorney's explanation that appellant and Rivera wanted to talk about the offered package deal and credited counsel's explanation. Appellant offers no reason to believe that his decision to plead guilty would have been different if his attorney had been present at this meeting. Appellant simply did not make "a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation." (*People v. Crandell, supra,* 46 Cal.3d at p. 859; see *People v. Horton, supra,* 11 Cal.4th at p. 1102.)

II.

"Section 1018 permits a trial court to allow a criminal defendant to withdraw his guilty plea 'for a good cause shown.' However, ' "the withdrawal of such a plea rests in the sound discretion of the trial court and may not be disturbed unless the trial court has abused its discretion." [Citation.] An appellate court will not disturb the denial of a motion unless the abuse is clearly demonstrated.' (*In re Brown* (1973) 9 Cal.3d 679, 685, quoting, in part, *People v. Francis* (1954) 42 Cal.2d 335, 338.) It is the defendant's burden to produce evidence of good cause by clear and convincing evidence. (*People v. Cruz* (1974) 12 Cal.3d 562, 566-567.)" (*People v. Wharton* (1991) 53 Cal.3d 522, 585.)

"To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. (*People v. Cruz, supra,* 12 Cal.3d at p. 566; *People v. Nance* [(1991)] 1 Cal.App.4th [1453,] 1456.) Other factors overcoming defendant's free judgment include inadvertence, fraud or duress. (*People v. Griffin* (1950) 100 Cal.App.2d 546, 548; *People v. Dena* (1972) 25 Cal.App.3d 1001, 1008.) However, '[a] plea may not be withdrawn simply because the defendant has changed his mind.' (*Nance, supra,* 1 Cal.App.4th at p. 1456; *In re Brown, supra,* 9 Cal.3d at p. 686.)" (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.)

In the present case, appellant pled guilty as part of a package deal with his codefendant. *In re Ibarra* (1983) 34 Cal.3d 277, 288-289, held that package deal plea bargains are not inherently coercive but, because "special scrutiny must be employed to ensure a voluntary plea" (*id.* at p. 287), an inquiry must be conducted into the "totality of

the circumstances whenever a plea is taken pursuant to a 'package-deal' bargain" (*id.* at p. 288.) *Ibarra* set out certain factors to be considered: "First, the court must determine whether the inducement for the plea is proper. The court should be satisfied that the prosecution has not misrepresented facts to the defendant, and that the substance of the inducement is within the proper scope of the prosecutor's business. [Citation.] The prosecutor must also have a reasonable and good faith case against the third parties to whom leniency is promised . . . .

"Second, the factual basis for the guilty plea must be considered. If the guilty plea is not supported by the evidence, it is less likely that the plea was the product of the accused's free will. The same would be true if the 'bargained-for' sentence were disproportionate to the accused's culpability.

"Third, the nature and degree of coerciveness should be carefully examined. Psychological pressures sufficient to indicate an involuntary plea might be present if the third party promised leniency is a close friend or family member whom the defendant feels compelled to help. '[T]he voluntariness of a plea bargain which contemplates special concessions to another—especially a sibling or a loved one—bears particular scrutiny by a trial or reviewing court conscious of the psychological pressures upon an accused such a situation creates.' [Citation.] . . .

"Fourth, a plea is not coerced if the promise of leniency to a third party was an insignificant consideration by a defendant in his choice to plead guilty. For example, if the motivating factor to plead guilty was the realization of the likelihood of conviction at trial, the defendant cannot be said to have been 'forced' into pleading guilty, unless the coercive factors present had nevertheless remained a *substantial factor* in his decision. [Citations.]

"Our list is by no means exhaustive. Other factors, which may be relevant, can and should be taken into account at the inquiry. For example, the age of the defendant [citation], whether defendant or the prosecutor had initiated the plea negotiations [citation], and whether charges have already been pressed against a third party [citation]

might be important considerations." (*In re Ibarra, supra*, 34 Cal.3d at pp. 288-290, fn. omitted.)

At the hearing on the motion to withdraw the guilty plea, appellant testified that the meeting with Rivera and the attorneys "was all about getting a package deal for Felicia so it would run concurrent with her six-year residential charge [in another case]." Appellant said that his attorney left him alone at the meeting with Rivera and her attorney and appellant felt they manipulated him into pleading guilty. Rivera, to whom appellant had been engaged, had told him "she would like it very much if I would take the package deal so that she wouldn't have to do any more time other than the six years." Appellant felt Rivera's attorney misled and rushed him, and Rivera "started rubbing my fingers and stuff and, you know, the sweet-talk thing. And that did it."

Appellant testified that he did not have any part in the vehicle theft, but pled guilty to help Rivera because he was in love with her. About the plea bargain, appellant stated, "I feel it's kind of expensive for—for the amount of things I had to do with this situation, and I feel that I shouldn't be led or manipulated because of my love for somebody and to—an extent I have a package deal, so to say, I think 4.8 years is kind of expensive for what I did." While Rivera had previously "made it seem like we're gonna stay together until we grow old and get married," appellant had overheard her in jail "laughing about how I'm a sucker and—stuff like that to the other girls." Since being sentenced, Rivera had not spoken to appellant and had said she was going back to her children and another man.

Appellant acknowledged that he had pled guilty to these charges before, by choice, in order to get a suspended sentence, and that he was willing to plead guilty but was disappointed in the sentence he was getting. He also stated that in addition to Rivera manipulating him, her attorney misled him by saying that if appellant represented himself the trial would still begin on Monday, three days later. Appellant stated that he changed his mind about the plea over the weekend, elaborating that he was mentally ill and took psychotropic medications, and it took the weekend for him to "figure it out." Although appellant acknowledged that he entered the guilty plea to help Rivera and he received this

benefit of the bargain, he testified that the more he thought about it, "the stronger I started feeling that I let myself down; that I didn't deserve to—to serve that much time on what I did."

Consideration of the *Ibarra* factors for evaluating a package plea bargain leads to the conclusion that the trial court did not abuse its discretion in denying appellant's motion to withdraw his plea. Appellant was familiar with the criminal justice system: He had two prior convictions, at least one of which resulted from a plea bargain, and four parole violations. Appellant made no suggestion that the prosecution acted improperly in charging him or made any misrepresentations to him.

Despite appellant's denials, there was a factual basis for the plea. The presentence report reflected that appellant was identified as the person security personnel had seen leaving WalMart with items for which he had not paid and that he offered conflicting stories about how they came into his possession; that appellant entered the Toyota Corolla that had been reported stolen and that appellant was found in possession of the AAA Auto Club card belonging to the owner of the stolen car. When appellant entered his plea, he stated that he was doing so because he was in fact guilty of the offenses. Appellant had previously pled guilty to the same charges and at that time, too, acknowledged he was doing so because he in fact committed the offenses.

The focus of appellant's argument is on the third *Ibarra* factor, with his complaint that he was coerced into accepting the plea bargain because of his love for Rivera and desire to help her achieve a lesser sentence. As part of the package deal plea bargain, Rivera was promised a maximum sentence of six years for both the present case and another in which she had already pled guilty. Without the package plea bargain, Rivera faced additional prison time. Appellant's argument is that his will was overborne by Rivera and his attorney permitted this to happen by leaving him alone with Rivera and her attorney.

Appellant's testimony at the May 22 hearing, however, indicates that he voluntarily entered the guilty plea on April 4, then changed his mind about it after learning that Rivera did not in fact intend to continue her romantic relationship with him.

Appellant testified that after he entered the plea, he overheard Rivera in jail laughing about him being a "sucker" and learned that Rivera was ending their relationship. This testimony strongly suggests a motive for appellant wishing to revoke his plea—not because he was coerced into it, but because he no longer wished to give Rivera its benefit.

Appellant also testified that he realized after entering his plea that he did not "deserve" to serve so much prison time. "Postplea apprehension (buyer's remorse) regarding the anticipated sentence, even if it occurs well before sentencing, is not sufficient to compel the exercise of judicial discretion to permit withdrawal of the plea of guilty." (*People v. Knight* (1987) 194 Cal.App.3d 337, 344.) Moreover, appellant's assertion that the plea offered him no benefit is not credible. Appellant was charged with offenses potentially carrying a prison term of more than eight years; the plea limited his sentence to four years eight months. While appellant testified that he believed he should have been given probation, he had previously entered a plea to these same charges as part of a bargain including probation and the court had rejected the plea precisely because it did not view probation as an acceptable sentencing option. The probation report for the current offenses recommended against probation, stating that appellant had a "proven history of being a failure on parole, and his history clearly indicates he would be a failure on probation. He has two prison convictions and has not changed his criminal behavior."

In short, we can find no abuse of discretion in the trial court's refusal to allow appellant to withdraw his guilty plea.

The judgment is affirmed.

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Kline, P.J.

We concur:

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Haerle, J.

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Ruvolo, J.